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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

FOSTER COPE, as Trustee, etc., et al.,

Plaintiffs and Appellants,

v.

WILLIAM L. LYON & ASSOCIATES, INC.,

Defendant and Respondent.

C076940

(Super. Ct. No. S-CV-0031387)

After ceasing to respond to the efforts of defendant William L. Lyon & Associates, Inc. (Lyon), to litigate this matter, plaintiffs¹ at last requested a continuance to oppose defendant's motion for summary judgment premised on deemed admissions that resulted from ignored discovery requests. Plaintiffs cited Code of Civil Procedure section 473, subdivision (b) (section 473(b)) on the ground of attorney inadvertence,

¹ The plaintiffs are Foster (Bud) Cope, as trustee of a family trust, Dan Starelli, Damon Conn, Claude Paolini, Sam Cortez, Tim and Glenda Resh, Eric Scriven, Earl and Jennifer Cross, Don Garner, and an unnamed successor in interest to Muriel Morris.

mistake, or excusable neglect. The trial court denied the motion.² After plaintiffs subsequently failed to seek leave to file any opposition, or request a hearing in response to the trial court's tentative decision, the court granted summary judgment to defendant because plaintiffs had failed to satisfy their burden of establishing that a triable issue of material fact existed. Plaintiffs did not seek to set aside the judgment; they simply filed the present appeal. (We note only the actual judgment's cover page appears in their appendix, along with the *order* adopting the tentative decision to grant the motion and an unstamped notice of appeal.)

Plaintiffs, relying on authority almost universally rejected, contend the trial court erred under section 473(b) in *denying the continuance*; notably, they do not present any other basis for attacking the substance of the ruling on the motion. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Lyon is a real estate broker. Two of its salespeople solicited plaintiffs to invest in a company that sought to purchase and develop a building in Placerville. The project failed. Plaintiffs filed this action, alleging the salespeople had been acting as agents of Lyon in the course and scope of their employment, trading upon Lyon's reputation to give them credence in their solicitations of plaintiffs and making it appear the investment would be part of Lyon's operations. Apparently, plaintiffs subsequently dismissed the two salespeople from the action (the order not being part of either of the appendices filed on appeal), leaving only Lyon as a defendant.

In August 2013, Lyon propounded various discovery requests in anticipation of a February 2014 trial date. These included requests for admissions. Counsel for plaintiffs

² The court noted that plaintiffs had not sought a continuance pursuant to the provision in Code of Civil Procedure 437c, under which the application was untimely and failed to comply with the procedure for relief. (*Id.*, subd. (h); *Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1353.)

(Michael J.M. Brook) repeatedly requested extensions of time to reply, which Lyon's counsel granted. Mr. Brook also repeatedly rescheduled depositions that Lyon had noticed. Lyon eventually sought a motion to compel in November 2013. Plaintiffs did not file any opposition, and the trial court granted the motion, which included an order deeming the requests for admission admitted and an award of sanctions jointly against Mr. Brook and his clients.

Mr. Brook continued to cancel noticed depositions and did not comply with the order to compel discovery. (This led Lyon eventually to file a motion for terminating or issue sanctions and monetary sanctions in February 2014.)

In the course of this discovery dispute, Lyon's attorney initiated meet-and-confer efforts in late November 2013 regarding her intention to file a motion for summary judgment. She noted that it would be based on the deemed admission that the salespeople were not acting as agents of Lyon in their misrepresentations to plaintiffs. She reiterated her desire to discuss the motion in December 2013 in the course of asking Mr. Brook to comply with the order to compel. Not hearing from Mr. Brook, Lyon served a motion for summary judgment on January 14, 2014, noticed for April 1, 2014. Lyon received a delivery confirmation the next day. (The motion itself is not part of the record on appeal, but apparently its theme was in keeping with counsel's previous communications.)

On page 6 of the factual background in the memorandum in support of the February 2014 motion for sanctions, Lyon noted that its pending motion for summary judgment was set for April 1. Though plaintiffs filed an opposition to this sanctions motion (which is not part of the record on appeal), Lyon did not receive any opposition to the motion for summary judgment by the due date of March 18. When Lyon's counsel contacted him after the deadline and provided proof of service of the motion, Mr. Brook stated he could not find the motion, but did not dispute proper service of it.

On March 26, Mr. Brook filed his ex parte application to continue the hearing on the motion for summary judgment. He claimed to have been unaware of the motion, first learning of it when contacted about the lack of opposition. He had searched his office and was not able to find the motion. If the court continued the matter to April 22, he would be able to file opposition on or before April 7. “This request is being made pursuant to . . . section 473(b) in that my failure to receive the papers and timely respond was the result of mistake, inadvertence[,] or excusable neglect.” He contended that he had been involved in a recently concluded lengthy trial with “complex post-trial motions.” Lyon’s opposition attested to many of the facts set out above and argued that Mr. Brook could not reasonably have been unaware of the motion, and therefore was not justified in waiting until this point to ask for a continuance.

Citing the delivery receipt and the reference to the pending motion in the sanctions memorandum, the trial court found Mr. Brook was on notice of the motion for summary judgment. Since surprise was not present, plaintiffs did not have a reasonable excuse for failing to file opposition. The court also ruled that plaintiffs were not entitled to mandatory relief for attorney fault because the provisions of section 473(b) did not apply to a failure to oppose summary judgment.

In its tentative ruling on the motion, the trial court stated, “Lyon submits evidence which establishes that, with respect to each [count], the acts of which plaintiffs complain were not committed by individuals acting as agents of Lyon. . . . As plaintiffs did not oppose Lyon’s motion for summary judgment, they fail to establish the existence of a triable issue of material fact. Lyon is entitled to judgment as a matter of law.” The court adopted it as its final ruling after plaintiffs failed to contest it. It entered judgment for Lyon in June 2014.

DISCUSSION

In their three pages of argument on appeal, plaintiffs assert the trial court erred in failing to apply the mandatory provisions of section 473(b) for attorney fault because the “effect” of counsel’s mistake led to dismissal. They rely exclusively on *Avila v. Chua* (1997) 57 Cal.App.4th 860. *Avila* concluded that an order granting a motion for summary judgment for want of timely opposition was “directly analogous” to a default judgment, and therefore section 473(b)’s mandatory provision should apply *to the order granting summary judgment*. (*Avila*, at pp. 865, 868, 869-870.)³

As a preliminary matter, we note nothing in *Avila* suggests that section 473(b) has any application to *a request for a continuance*, which is not of itself *any* sort of dismissal. Had plaintiffs sought to set aside the *order granting summary judgment* under section 473(b), it would have some relevance.

Even if we entertained this poorly framed argument, however (given that the trial court applied the statute in denying the continuance), we would not be convinced. In the first place, it would essentially abrogate the requirements for obtaining a continuance under the summary judgment statute itself if they could be evaded with a mere confession of attorney error. More to the point, *Avila* has been found unpersuasive (along with cases of its ilk) in a lengthy line of cases beginning with our decision in *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 146-148, because it disregards the language and history of section 473(b), and misapplies the reasoning in earlier cases of this court. (Accord, *Las Vegas Land & Development Co., LLC v. Wilkie Way, LLC*

³ Plaintiffs also cite our decision in *Bernasconi Commercial Real Estate v. St. Joseph’s Regional Healthcare System* (1997) 57 Cal.App.4th 1078, 1082, although its relevance to the present appeal escapes us, as it limited section 473(b)’s mandatory provisions to an unopposed dismissal for dilatory prosecution (as a “procedural equivalent” of a default), not unsuccessfully opposed dismissals. (Accord, *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1824.)

(2013) 219 Cal.App.4th 1086, 1091; *Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 227-229.) Under these decisions, section 473(b)'s mandatory provisions do not even apply to orders granting summary judgment, let alone a motion for a continuance to oppose such a motion.

Since section 473(b)'s mandatory provisions do not apply, and plaintiffs are not even entitled to relief under its discretionary provisions in a motion for a continuance that was inadequate under the summary judgment statute itself, plaintiffs cannot possibly hope to establish that the trial court abused its discretion in denying a continuance when it gave consideration to relief to which they were not entitled. Moreover, plaintiffs do not show how they were prejudiced in any fashion, because they fail to establish any basis for an effective opposition to deemed admissions fatal to their action against Lyon. (*People v. Singh* (2015) 234 Cal.App.4th 1319, 1330-1331.) This appeal consequently lacks any merit.

DISPOSITION

The judgment is affirmed.

BUTZ, Acting P. J.

We concur:

DUARTE, J.

HOCH, J.